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| APPLICATION NO.   | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO.               | CONFIRMATION NO. |
|---|-------------|----------------------|-----------------------------------|------------------|
| 10/021,901  | 12/13/2001  | Cynthia H. Nordness  | KCC-15,611                        | 1981             |
| 35844   | 7590        | 02/17/2005           |                                   |                  |
| PAULEY PETERSEN & ERICKSON<br>2800 WEST HIGGINS ROAD<br>HOFFMAN ESTATES, IL 60195 |             |                      | EXAMINER<br>MUROMOTO JR, ROBERT H |                  |
|   |             |                      | ART UNIT                          | PAPER NUMBER     |
|   |             |                      | 3765                              |                  |

DATE MAILED: 02/17/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/021,901

Applicant(s)

NORDNESS ET AL.

Examiner

Robert H Muromoto, Jr.

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 06 December 2004.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,2,4-11 and 17-22 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2, 4-11, and 17-22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1,2, 4-11, and 17-22, to the extent that they are understood by the Examiner, are rejected under 35 U.S.C. 102(a) as being anticipated by Cristoffel et al.

Cristoffel discloses a one-piece, disposable swimsuit in many different embodiments. The outer material of the suit or coverstock 50 can take many forms and materials and can be elastic or inelastic, stretchable or unstretchable (col. 11, line 1). The stretchable material may include woven (mesh); (claim 2) or nonwoven (claim 3) material (col. 11, line 47-49). The coverstock 50 of the suit can be a single layer of material or a multi-layered (claim 8) laminate structure. For instance, the coverstock 50 can include a liquid permeable outer layer and a liquid permeable inner layer that are suitably joined together by a laminate adhesive (col. 11, lines 51-55). The liquid permeable outer layer can be any suitable material and desirably one that provides a generally cloth-like texture. One example of such a material is a spunbond polypropylene (claim 4) nonwoven web having a basis weight (claims 9-11) of about 1-100 grams per square meter (col. 12, lines 1-4). Other examples of suitable materials include polyolefin (polyethylene) or other thermoplastic (nylon) nonwoven webs having

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basis weights in the same ranges, including spunbond webs, meltblown webs, and spunbond/meltblown/spunbond webs (col. 12, lines 7-12); (claims 5-7).

Concerning the fastening means of the garment, the bodice 42 is attached to the chassis 22 about the waist region 24 (col. 5, lines 40-42). Leg elastics 56 can be attached to the chassis 22 about the leg openings 26 (claims 1 and 18-20) for enhanced fit and containment of waste (col. 5, lines 60-65). The coverstock 50 can have areas of differential stretch to improve fit. For example, desirable areas of greater stretch include the waist region 24. An embodiment shown in fig. 10 shows strips of elastic material 112 added around the waist (claim 17) to improve fit (col. 7, lines 29-35).

In still another embodiment of the swimsuit 20 shown in figure 18, the swimsuit can be made of primarily one piece of coverstock 50 with a neck opening 48 and two leg openings 26 cut within the coverstock 50. A refastenable fastening system 92, can be applied to the front region 44 of bodice 42 along the waist region 24, such that the bodice 42 and the chassis 22 can be releasably engaged to each other (col. 8, lines 20-32); (claims 21 and 22).

With respect to "swimwear liner" limitation, there is nothing in the structure of Cristoffel, that would preclude the swimsuit from being either a stand alone garment or a swimwear liner. Therefore the "swimwear liner" limitation is also anticipated by Cristoffel.

Additionally, no "absorbent assembly" as defined by the applicant, is required by Cristoffel.

***Claim Rejections - 35 USC § 103***

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 12-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cristoffel et al.

Although Cristoffel teaches essentially all of the limitations of the instant invention Cristoffel does not teach the specific pore size or tensile strength of the mesh material. Cristoffel does teach that holes (pores) or slits can be used to manipulate the material's permeability. Cited directly from Cristoffel, "Absorbent swimwear is designed for leakage prevention prior to swimming. Thus, when a wearer wears absorbent swimwear into a pool or lake, the swimwear has a tendency to fill up with water in the crotch region 32. Therefore, the containment flaps 58 of this invention are suitably **liquid-permeable to alleviate the build-up of excess swim water within the swimsuit 20 while still retaining any bowel movement or other solid material within the swimsuit.** (paragraph 51, of Cristoffel)"

Therefore, with respect to the limitations of pore size and tensile strength, the specification contains no disclosure of either the critical nature of the claimed limitations nor any unexpected results arising therefrom, and that as such the limitations were arbitrary and therefore obvious. Such unsupported limitations cannot be a basis for patentability, since where patentability is said to be based upon particular dimensions or another variable in the claim, the applicant must show that the chosen variables are

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critical. In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ2d 1934 (Fed. Cir. 1990). One having ordinary skill in the art would be able to determine through routine experimentation the ideal levels of pore size and tensile strength for a particular application.

### ***Response to Amendment***

Newly amended claims and newly submitted claims are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: the original restriction requirement and subsequent election by the applicant was directed to a stand alone disposable garment, while new and amended claims recite a new embodiment altogether which recites a stand alone garment liner.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 49-60 have been withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03. Further, claims 1-22, as amended, present a separate and distinct invention to that elected. Applicant may correct this amendment by removing any reference to the word "liner", since this word is considered that which causes the new invention not previously claimed.

If applicant wants to prosecute the newly claimed invention this must be done in a separate application, see MPEP 818.02(a).

### ***Response to Arguments***

Applicant's arguments filed 12/6/2004 have been fully considered but they are not persuasive.

35 USC 112, second paragraph rejections have been withdrawn due to amendment to the use of "absorbent assembly" rather than "absorbent material".

Applicant's arguments with respect to the invention being a "liner" rather than a garment are moot for reasons above.

Applicant's remarks with respect to the constructive election above are not persuasive. Applicant has elected the invention drawn to a stand alone garment, "stand alone" implies that the item is "stand alone". It is not clear how the item can be a "stand alone garment" as well as a "liner" or "swimwear liner", both terms implying layering of the garment with another item, which would clearly make the item not "stand alone". Applicant has defined "stand alone" but the definition is silent with regards to the meaning with respect to other layers. Accordingly, under the broadest reasonable interpretation "a stand alone" garment, as understood by the examiner, is a garment that does not need additional items to be worn with it.

With respect to the 35 USC 103 rejection, applicant has not shown the criticality of the specific range of tensile strength recited in the claims. Also the pore size ranges do not show any unexpected results, as Cristoffel teaches that holes or pores can be used to manipulate a material's permeability, and that an important factor for swimwear is to be permeable to liquid but impermeable to fecal matter. Additionally, one of ordinary skill in the art, would easily recognize that pores with such small dimensions would be impermeable to fecal waste.

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Additionally, Cristoffel's teaching of a swimsuit does not teach away from a swimsuit liner, as argued by the applicant. Swimsuits are often worn underneath other clothing including other swimsuits, which in broad terms means the swimsuit can also function as a swimsuit liner. The standard is not if it is "logical" for the garment to be used as a liner, as suggested by applicant, but rather can the item perform the recited function. In this case the invention of Cristoffel could clearly be used as a swimwear liner as there is nothing in the structure that would preclude it from functioning as such.

Since these are the only arguments the rejection remains and is considered to be proper.

### ***Conclusion***

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert H Muromoto, Jr. whose telephone number is 703-306-5503. The examiner can normally be reached on 8-530, M-F.




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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Calvert can be reached on 703-305-1025. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Bhm

February 15, 2005

  
JOHN D. CALVERT  
SUPERVISORY PATENT EXAMINER  
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